88- 1730

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

ATTORNEYS' TITLE GUARANTY FUND, INC.,

Petitioner,

v.

DAVID K. RICHARDS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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April 21, 1989

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QUESTIONS PRESENTED

Does a federal court of appeals considering a case where jurisdiction is based on diversity of citizenship have the power to create a new substantive theory of law which allows a principal to be held liable for the crimes of an independent agent, where liability under similar circumstances has been expressly rejected by the highest state appellate court in the applicable jurisdiction?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the Respondent David K. Richards, who was the plaintiff at trial, and the Petitioner Attorneys' Title Guaranty Fund, Inc., and co-defendants H. Ray Christman and Platte Valley Bank. H. Ray Christman was dismissed from the case at the time of trial and has not participated in any appeals.

Platte Valley Bank separately appealed the jury verdict against it to the United States Court of Appeals for the Tenth Circuit. In the decision captioned, *David K. Richards v. Platte Valley Bank*, 866 F.2d 1576 (10th Cir. 1989), the verdict against Platte Valley Bank was reversed and the case was remanded for dismissal by the district court. David K. Richards has not sought an appeal from the decision. Neither H. Ray Christman nor Platte Valley have any interest in this appeal.

Petitioner Attorneys' Title Guaranty Fund, Inc. has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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DAVID K. RICHARDS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Attorneys' Title Guaranty Fund, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on February 14, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 866 F.2d 1570 (10th Cir. 1989), and is reprinted in the Appendix hereto, p. App. 1 *infra*. The opinion in the related appeal by the co-defendant

Platte Valley Bank is reported at 866 F.2d 1276 (10th Cir. 1989).

JURISDICTION

Federal jurisdiction was initially invoked by the Respondent under diversity of citizenship pursuant to 28 U.S.C. § 1332. Following trial, the court entered judgment in the amount of $495,823.00 on October 4, 1985. The Petitioner appealed the judgment to the United States Court of Appeals for the Tenth Circuit. On February 14, 1989, the United States Court of Appeals for the Tenth Circuit entered its order and opinion affirming the trial court's judgment. (*See* App., p. App. 1, *infra.*) A Petition for Rehearing was filed by the Petitioner on March 3, 1989. The Petition for Rehearing was denied by the United States Court of Appeals for the Tenth Circuit on March 22, 1989. (App., p. App. 16.)

Jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Attorneys' Title Guaranty Fund, Inc. ("Attorneys' Title") is appealing a judgment entered by the district court upon a jury verdict entered against it in the amount of $495,823.00. The claim upon which the verdict and judgment were based arose out of the embezzlement of funds being held in escrow for the benefit of the Respondent, David K. Richards ("Richards"), by the president of

Centennial Escrow Services, Inc. ("Centennial"), a corporation in whose trust account such funds had been deposited. Richards' assertion of liability against Attorneys' Title was based upon his claim that Centennial was an agent of Attorneys' Title, thereby rendering itself liable for the agent's embezzlement.

Attorneys' Title is a title insurance company formed by the Colorado Bar Association in 1960. Its sole members and stockholders are lawyers, located in Colorado and Utah, through whom its policies are issued. Its procedures are designed to allow an attorney-member, who might otherwise be examining the status of a real estate title to issue a title insurance policy. Attorneys' Title charges a premium for the issuance of the title insurance policy. A portion of this premium is paid to the attorney-member.

Centennial was a corporate entity which was entirely separate and independent from Attorneys' Title. There was no common officers, directors, employees or facilities between the two corporations. One of Centennial's business purposes was to provide real estate closing services to the public. Centennial had previously provided closing services to members of Attorneys' Title who did not wish to provide their own closing services. All compensation was paid to Centennial from the parties to the real estate transaction. There was never any payment made to or from Attorneys' Title to Centennial Escrow. Indeed, no employee of Attorneys' Title had ever met Susan Walter, the only employee who handled closings for Centennial.

Richards was an attorney who was a member of Attorneys' Title residing in Utah. He owned thirteen separate 7-Eleven store properties located in Colorado and Utah. In early November 1982, Richards met with a prospective buyer of the stores. Ultimately, the parties entered into a written contract for the sale of the properties. The agreement provided that the total purchase price of the properties was to be One Million Fifty Thousand Dollars ($1,050,000.00) and that the sum of Four Hundred Thirty Thousand Dollars ($430,000.00) was to be paid to Richards at closing. Nothing within this agreement called for the escrow of the sale proceeds.

Since Richards was a member of Attorneys' Title, he saw to it that the agreement with the buyer provided that the title insurance policy would be issued by Attorneys' Title. Richards effectuated a substantial savings in the amount required to be paid by him for title insurance.

In early November 1982, Richards contacted Attorneys' Title's Colorado representative and requested that Attorneys' Title assist in the transaction. The Attorneys' Title representative advised him that, while Attorneys' Title did not normally provide closing services, it would accommodate Richards in assisting in the recording of the documents if the transaction could be kept very simple.

In mid-December 1982, H. Ray Christman ("Christman"), the transaction's real estate broker, approached the representative of Attorneys' Title and asked that Attorneys' Title prepare the settlement sheets. Christman was told that Attorneys' Title did not perform closing services. Mr. Christman was also told that the closing was

so simple that there was no need to call any other party to prepare the settlement sheets. Christman, however, insisted that he wanted someone. Thus, as a courtesy to Christman, the Attorneys' Title representative contacted Centennial and ascertained that Centennial could handle the closing and advised that Christman would be in touch.

The closing of the transaction was held on December 30, 1982. Present was Centennial's representative, Susan Walter. Walter had prepared the settlement documents and signed them as agent for Christman, the real estate broker.

Upon being informed that a single check had been made payable to Richards, a controversy developed. The Buyer and his counsel, as well as Walter from Centennial, insisted that no check should be delivered to Richards until all of the necessary documents were recorded. Richards' representative suggested that the check be held by Attorneys' Title, either in its Denver or its Salt Lake City office. The suggestion was refused by the buyer and his counsel who insisted that the funds be deposited in Centennial's trust account or the buyer would refuse to go through with the transaction. (Tr., Vol. II, pp. 112-117; 211-212; 219; 257-258; 266.)

To resolve the controversy, a new agreement was drafted by the parties. The new agreement provided that a check would be issued payable to Centennial and that the funds would be placed in Centennial's trust account pending distribution after all documents had been recorded. Upon execution of this new agreement, the

bank issued a new check payable to Centennial. After closing, the check was deposited in Centennial's trust account at the Platte Valley Bank. Subsequently, Centennial's president, Duane Marshall, induced the Platte Valley Bank to allow him to receive the escrowed proceeds in cash whereupon he embezzled the funds and absconded from the State. The funds were never recovered.

Richards brought an action in federal court against Platte Valley Bank, the depository bank which was induced to provide the escrowed funds to Duane Marshall; H. Ray Christman, the real estate agent whose agent was allegedly Centennial; and against Attorneys' Title.

In his claims against Attorneys' Title, Richards did not assert that Attorneys' Title was negligent in the selection or recommendation of Centennial Escrow as a closing agent. Instead, Richards asserted that the Centennial Escrow was an agent of Attorneys' Title and Attorneys' Title had placed Centennial Escrow in a position to commit the embezzlement of the funds from Richards. Therefore, Attorneys' Title was to be held liable for the theft of the funds by Duane Marshall. This was despite the fact that at no time had any employee of Attorneys' Title met, spoken to or dealt with Duane Marshall. Nor at any time did Duane Marshall represent to anyone that he was acting on behalf of Attorneys' Title. (Tr., Vol. II, p. 281.)

The trial court allowed the jury to be instructed on Richards' theory. The jury found in favor of Richards and the court entered judgment against Attorneys' Title in the amount of $495,823.00. Platte Valley Bank was also found

liable to Richards on separate legal grounds. Christman was dismissed as a defendant during the trial.

Attorneys' Title appealed the entry of the district court judgment to the United States Court of Appeals for the Tenth Circuit. The appeal asserted that the trial court applied a standard of law totally unknown under Colorado law or in any other jurisdiction of the United States. This new standard of law would allow the imputation of liability to a principal for the intentional torts or crimes of its non-employee agents. On February 14, 1987, the Tenth Circuit issued its opinion affirming the judgment against Attorneys' Title. (App., p. App. 1.) A Petition for Rehearing was filed with the Tenth Circuit on March 3, 1989. The Petition was denied on March 22, 1989.

REASONS FOR GRANTING THE WRIT

Does a federal court of appeals considering a case where jurisdiction is based on diversity of citizenship have the power to create a new substantive theory of law which allows a principal to be held liable for the crimes of an independent agent, where liability under similar circumstances has been expressly rejected by the highest state appellate court in the applicable jurisdiction?

Without authorization or authority, the Tenth Circuit has created a new type of tort liability which it now seeks to apply in Colorado. The Tenth Circuit opinion and order announces that a principal may be held vicariously liable for any crime of an independent agent so long as the principal places the independent agent in a position

to commit the crime. (App., p. App. 9.) This is a concept of liability not only unknown under Colorado law, but also unknown under the law of any other jurisdiction in the United States.

Jurisdiction of the United States Supreme Court is being invoked by way of the writ of certiorari due to the Tenth Circuit's determination of state law which is in conflict with previous decisions of the Colorado Supreme Court. In creating a new theory of liability, the Tenth Circuit has so far departed from the long-standing pronouncements of this Court as to call for an exercise of this Court's power of supervision. Review of this matter also gives the Court an opportunity to clarify the federal court's role in applying state law in diversity cases. The question becomes is it the federal court's role to apply state law, or is it the federal court's role to create new state substantive law?

Under the now discarded rule of *Swift v. Tyson*, 16 Pet. 1, 18, 10 L.Ed. 865, 871, a federal court was able to determine, through its own independent judgment, what the applicable law in a diversity case should be and disregard any previous pronouncements found in the case law of state appellate courts. This rule led to judicial discrimination in favor of non-citizens in diversity cases who could select between state and federal courts to procure advantageous legal doctrines. This prevented any uniformity in the administration of the laws of the state. *Erie v. Tompkins*, 304 U.S. 64, 75, 58 S.Ct. 817, 82 L.Ed. 118 (1938). The *Swift* doctrine was abolished by the United States Supreme Court in *Erie v. Tompkins, supra.* In

order to ensure the equal administration of justice in cases arising out of state law, federal courts were required to apply the state law applicable to the jurisdiction as pronounced by the state appellate courts. The court ruled the Federal Constitution gave neither congress nor the federal courts the right to declare what the substantive common law should be for an individual state. This includes questions of state tort law. Federal judges are not allowed to brush aside existing state law where the court finds are in conflict with its own views and impose the court's own standards of liability. *Erie v. Tompkins, supra* at 78. Instead, it is the duty and obligation of the federal district court or federal court of appeals sitting in a diversity of citizenship case to apply the law of the state in question, here Colorado law. *Erie v. Tompkins, supra; Louisiana Power and Light Company v. Thibodaux,* 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959); *Hanna v. Plummer,* 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

There is a great difference between applying the state law by the federal court and the creation of new state substantive law by fiat. If there are insufficient cases from which to determine how a state court might rule on an issue, it is not up to the federal court to determine how the state should rule on the issue. Instead, a federal court should refrain from the creation of new substantive state law until the question has been resolved by the state court, including the certification of the question to the state appellate courts. *Clay v. Sun Insurance Office,* 363 U.S. 207, 212, 80 S.Ct. 1222, 4 L.Ed.2d 1170 (1960); *Meridian v. Southern Bell Tel. & Tel. Co.,* 358 U.S. 639, 79 S.Ct. 455, 3 L.Ed.2d 562 (1959).

The Tenth Circuit's sole basis for upholding liability against Attorneys' Title in this case evolves out of an extension of a provision of the *Restatement of the Law, Agency 2d*, § 261 (hereinafter "§ 261"). This Section of the Restatement provides:

> A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud.

However, § 261 relates specifically to cases involving fraud and misrepresentation, not theft, embezzlement or any other intentional tort. Therefore, it has no application to the present case.

There are no allegations or arguments that Centennial Escrow or Duane Marshall were employees or servants of Attorneys' Title. The Plaintiff asserts that Centennial Escrow was the agent of Attorneys' Title or in the parlance used in the *Restatement of the Law, Agency 2d*, a non-servant agent or independent contractor. (*Restatement of the Law, Agency 2d*, § 2 (a) and (b).) The basic distinction between servant and a non-servant agent in Colorado and elsewhere is that a master or principal of a servant can be held vicariously liable under the Doctrine of Respondeat Superior for the physical torts of a servant occurring during the course and scope of the servant's employment. *Restatement of the Law, Agency 2d*, § 219; *Landis v. McGowan*, 114 Colo. 355, 165 P.2d 180 (1946). However, a principal of a non-servant agent is not held liable for the physical harm caused by the actions of a

non-servant agent during the performance of the principal's business. *Restatement of the Law, Agency 2d*, § 250, § 2, comment (b); *Thayer v. Kirchhof*, 83 Colo. 480, 266 P. 225 (1928).

There are times, however, when a principal can be held liable for specific actions of a non-servant agent. One such circumstance is where a principal can be held liable for the fraud or misrepresentation of a non-servant agent if such fraud or misrepresentation is made while the agent is apparently acting under the authority of the principal. This concept is outlined in the *Restatement of the Law, Agency 2d* at §§ 256-264. See also *Dyer v. Johnson*, 757 P.2d 178 (Colo. App. 1988). Section 261 which was relied upon by the Tenth Circuit Court of Appeals is found within this fraud or misrepresentation section of the Restatement.

The principal is not held liable for the misrepresentations of a non-servant agent under the Doctrine of Respondeat Superior. Instead, liability is imposed by the agent's inherent power to contractually bind the principal to statements made by the agent. Comment (a) of the *Restatement of the Law, Agency 2d*, § 257, provides:

> The principal's liabilities [for his agent's frauds or misrepresentations] do not depend upon the theory Respondeat Superior, but upon the reasons underlying liability upon authorized or apparently authorized contracts (citations omitted). If the statement is one which, if true, the agent would be authorized or apparently authorized to make, the principal is subject to liability for it, although deceitfully made.

Therefore, the principal's liability for fraud or misrepresentations by a non-servant agent is a distinct legal concept separate and apart from a principal's vicarious liability for torts of a servant under the Doctrine of Respondeat Superior.

Section 261 applies this contractual liability principle. The rule contractually binds the principal to the fraud or misrepresentation of the agent where the agent is apparently acting on behalf of the principal. There was no argument or facts to support a position that Attorneys' Title's alleged agent, Centennial Escrow or its president, Duane Marshall, made a false representations or committed any fraud while apparently acting as an agent of Attorneys' Title. Instead, we are dealing solely with the theft of escrowed funds while in the possession of Centennial Escrow.

The Circuit Court's opinion holds that there is no difference between misrepresentation and theft or embezzlement and both concepts are interchangeable under § 261. The opinion states:

> The principal's liability under Section 261 is not based on the nature of the agent's act, i.e., whether it is a misrepresentation or a theft, but rather is based upon the principal placing the agent in a position to interact with a third party who is harmed.

(App., p. App. 9.) The decision of the Tenth Circuit extending § 261 to non-fraud or misrepresentation areas is a misconstruction of the purpose of § 261, is contrary to Colorado law which the Court seeks to apply and constitutes an extension of tort liability previously unknown in American Jurisprudence. In its opinion, the Tenth Circuit

fails to set any provision or case of Colorado law which would indicate Colorado would extend § 261 beyond misrepresentation cases to cases involving any intentional tort or crime.

While there are no Colorado cases involving the application of § 261, there is ample Colorado case law that provides that a principal is not liable for the negligence, intentional torts or crimes of a non-servant agent or independent contractor.

It is a well-established law in Colorado that a principal is not liable for the torts committed by a non-servant agent or independent contractor or by one of their servants. *Thayer v. Kirchhof*, 83 Colo. 480, 266 P. 225 (1928); *Western Stock Center, Inc. v. Sevit, Inc.*, 578 P.2d 1045 (Colo. 1978); 41 Am.Jur.2d, Independent Contractors, § 24.

There are no reported Colorado cases where any claimant has ever attempted to impute an intentional tort or criminal action of a non-servant agent to a principal. However, it would not follow any logical legal theory that a principal could not be held liable for the negligence of an agent, but could be held liable for the intentional torts or major crimes of that same agent.

Colorado Appellate Courts have consistently held that employee's intentional torts or crimes have not arisen out of the scope of their employment. See *Lombady v. Stees*, 132 Colo. 570, 290 P.2d 1110 (1955), (Employer not liable for bartender's intentional assault on a customer); *Novelty Theater Company v. Whitcomb*, 47 Colo. 110, 106 P. 1012 (1909), (Employer of actors in a theater group not

liable for assault by actors on patrons during a performance).

The recent Colorado Supreme Court case of *Destefano v. Grabian*, 763 P.2d 275 (Colo. 1988), reaffirms that the Colorado courts are not willing to extend vicarious liability beyond employees acting within the scope of their employment. In *Destefano*, a parish priest was having sexual relations with a female parishioner who had come to the priest for marital counseling. The priest was acting as an employee and agent of the catholic archdiocese, was apparently acting on behalf of the church and there is no doubt the archdiocese had placed him in a position where he could do harm to the parishioner. Given the Tenth Circuit's extension of tort liability, all of the elements necessary under § 261 would have been met.

However, the Colorado Supreme Court in dismissing the imputed negligence claim against the archdiocese, held that the archdiocese, as a principal, could not be held liable for the actions of its agent. Returning to traditional analysis, the court determined that sexual relations by a priest was so outside the expected duties and responsibilities of the priest that his actions could not come within the course and scope of his work for the church. Obviously, Colorado courts are a long way from adopting the Tenth Circuit rule which imposes liability on a principal for criminal actions of an agent wholly outside his duties and responsibilities to the principal. This is particularly true in a case such as the present case where Attorneys' Title was held liable for the criminal

embezzlement of a man they had never seen or dealt with.

There is ample Colorado law outlining the circumstances under which a principal can be held vicariously liable for the actions of an agent. The law only allows the imputation of a tortious act when the agent is acting within the course and scope of his employment. Not only was there no employment relationship between Attorneys' Title, Centennial Escrow or Duane Marshall, but at the time of the embezzlement, Mr. Marshall was not representing that he was acting on behalf of Attorneys' Title. However, the Tenth Circuit chose to ignore the long-standing Colorado law and instead chose to create a totally new substantive theory of liability.

CONCLUSION

The Petitioner is mindful of the United States Supreme Court's reluctance to grant certiorari in matters relating to the interpretation of state law and the traditional deference by the Supreme Court to the views of the circuit court judges who are deemed to be experts in the law of the respective states within their districts. However, the federal appellate judges are bound to follow state law developed by the highest appellate court of their respective states. Federal courts are not to create new theories of liability which they might feel are proper or justified and ignore long established state law. When a federal court of appeals makes a ruling at variance with the long-established laws of the appellate courts of the state, this Court has jurisdiction to review that decision. Further, this Court has a duty under its supervisory

powers over the circuit court of appeals to ensure the doctrines enunciated by this Court concerning the application of state law in diversity cases is being fulfilled.

Granting certiorari will provide the Court with an opportunity to develop guidelines for the federal circuit courts of appeals as to when they may apply existing state law and as to when they should not take it on themselves to create new substantive theories of liability under state law.

Respectfully submitted,

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April 21, 1989

APPENDIX

Order and Judgment of Tenth Circuit Court of Appeals, February 14, 1989 .....App. 1 – App. 15

Order Denying Petition for Rehearing, March 22, 1989.....App. 16 – App. 17

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DAVID K. RICHARDS, Plaintiff-Appellee, v. ATTORNEYS' TITLE GUARANTY FUND, INC., Defendant-Appellant, H. RAY CHRISTMAN and PLATTE VALLEY BANK, Defendants.	)	No. 85-2656

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. CIV. 84-Z-1857)
(Filed Febr. 14, 1989)

Steven J. Merker of Davis, Graham & Stubbs, Denver, Colorado, for Plaintiff-Appellee.

Mark R. Davis (John A. Criswell of Branney, Hillyard & Criswell, Englewood, Colorado, with him on the briefs), of Wood, Ris & Hames, P.C., Denver, Colorado, for Defendant-Appellant.

Before SEYMOUR, MCWILLIAMS, and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

Plaintiff Richards brought a civil action based upon diversity of citizenship against defendant, Attorneys' Title Guaranty Fund, Inc. (Attorneys' Title), a title insurance company. 28 U.S.C. § 1332 (1966). Richards sought to recover from Attorneys' Title $430,000 in funds that the president of Centennial Escrow Services, Inc. (Centennial) embezzled from Centennial's trust account. Richards alleged Centennial was an agent of Attorneys' Title and Attorneys' Title should be held responsible for the intentional conversion by Centennial's president. The jury returned a verdict against Attorneys' Title.

Attorneys' Title appeals, alleging the district court improperly instructed the jury because: (1) the general liability instruction based on the *Restatement (Second) of Agency* § 261 (1958) was not the law of Colorado; (2) the court improperly refused an instruction on the element of reliance; and, (3) the instruction defining agency did not contain the necessary element of control.

We find the district court properly instructed the jury on the law and AFFIRM the district court's judgment against Attorneys' Title.

Richards owned thirteen "7-Eleven" stores which he leased to the Southland Corporation. He was approached by a real estate agent regarding sale of the stores to Snyder. Richards negotiated a sale with Snyder. Richards agreed to provide title insurance. Richards then contacted the Attorneys' Title office in Utah and requested they issue title insurance on the properties. Attorneys' Title referred him to their Colorado office to prepare the title insurance on the three properties located in Colorado. Richards requested that the Colorado Attorneys' Title

office prepare the title insurance policies on the three properties, asked if that office could handle the closing on the entire transaction, and asked if they could hold the sale proceeds check until all transaction documents were properly recorded. Attorneys' Title agreed to perform these services.

The closing date was postponed from December 10, 1982, to December 30, 1982. Richards learned the Attorneys' Title office manager would be out of town on December 30. An Attorneys' Title employee told Richards that Walter, an employee of Centennial, would perform the closing. At the closing, Walter refused to release the sales proceeds check to Richards before the transactions documents were recorded. The buyer, Snyder, and Richards' attorney, in fact agreed to reissue the sales proceeds check to Centennial to be held in Centennial's escrow account until the transaction documents were recorded.

Walter took the sales proceeds check for $430,000 to Centennial's office and prepared a deposit slip to the escrow account. She then left the check and deposit slip for Centennial's president, Marshall, to deposit. Marshall deposited the check in Centennial's trust account at Platte Valley Bank on January 3, 1983. On January 5, 1983, Marshall asked the bank to release the $430,000 to him in cash, which the bank was unable to do because its cash on hand did not amount to $430,000. Marshall then instructed the bank to wire transfer the $430,000 to United Bank of Denver where Marshall received the money in cash and left the state.

Richards contacted Walter at Centennial and requested transfer of the sales proceeds because all the

transaction documents had been properly recorded. Walter then learned that Centennial's president had taken the proceeds and she informed Richards.

Richards brought this diversity suit to recover the $430,000 against Attorneys' Title and Platte Valley Bank. 28 U.S.C. § 1332 (1966). The jury returned a verdict against both defendants. Each defendant has appealed. Our opinion on Platte Valley Bank's appeal is reported at *Richards v. Platte Valley Bank*, ___ F.2d ___ (10th Cir. 1988) (No. 85-2665 filed February 14, 1989). In diversity cases, the federal court must apply the law of the forum state, in this case, Colorado. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Brady v. Hopper*, 751 F.2d 329 (10th Cir. 1984).

I.

Attorneys' Title asserts the trial court improperly instructed the jury on the theory of liability based upon § 261 of the *Restatement (Second) of Agency* (1958) because this section is not the law of Colorado. We have been unable to find, and neither party has cited us to a Colorado case which has discussed § 261. Our task is to predict whether the Colorado Supreme Court would apply this provision in a case like the one presented to this court. *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1574 (10th Cir. 1984).

The district court instructed the jury on the liability of Attorneys' Title stating:

> In order for the plaintiff, David K. Richards, to recover from the Defendant Attorneys' Title Guaranty Fund on his claim that Attorneys' Title Guaranty Fund is responsible for the theft of the escrow

proceeds by Duane Marshall, you must find – you must find all of the following have been proved by a preponderance of the evidence.

(1) In connection with the sale of the 13 7-Eleven stores and the escrow of the funds, Centennial Escrow Services, Inc., was an agent of Attorneys' Title Guaranty Fund;

(2) Attorneys' Title Guaranty Fund put Centennial Escrow Services in a position that permitted its president, Duane Marshall, to commit the theft of the $430,000;

(3) At the time of the theft, Centennial Escrow Services was apparently acting within its authority as an agent of Attorneys' Title.

If you find any of these propositions has not been proved by a preponderance of the evidence, then your verdict must be for the defendant. On the other hand, if you find that all of these propositions have been proved by a preponderance of the evidence, then your verdict must be for the plaintiff.

This instruction is based on the *Restatement (Second) of Agency* § 261. This section states:

> A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud.

Attorneys' Title objected to this instruction as being an inappropriate theory of law.

On appeal, Attorneys' Title asserts § 261 is not the law of Colorado because this section improperly imposes liability upon a principal solely upon an agent's intentional misrepresentation not authorized or consented to

by the principal. Attorneys' Title contends this instruction is contrary to the holdings in *Schuette v. Winternitz*, 498 P.2d 1183 (Colo. App. 1972) (not selected for official publication); and *Erisman v. McCarty*, 77 Colo. 289, 236 P. 777 (1925). We do not find this argument persuasive.

The general rule that a principal is liable for the torts of his agent is not grounded on agency principles, but rather the maxim of *"respondeat superior." Simpson v. Townsley*, 283 F.2d 743, 746 (10th Cir. 1960) (applying Kansas law); *Dyer v. Johnson*, 757 P.2d 178, 181 (Colo. App. 1988). Liability is determined by considering, from a factual standpoint, whether the tortious act was done while the employee, whether an agent or servant, was acting within the scope of employment. *Id.* at 180; *Crosswaith v. Thomason*, 95 Colo. 240, 35 P.2d 849 (1934). The principal's knowledge of the agent's tort is not a necessary element of liability. *See Stockwell v. United States*, 80 U.S. 531, 546 (1871).

In *Gilmore v. Constitution Life Ins. Co.*, 502 F.2d 1344 (10th Cir. 1974), this court construed Colorado law and held a principal liable for the fraudulent acts of its agent who was acting within the scope of his apparent authority. The court distinguished the holding in *Schuette*, which denied a principal's liability without proof of consent or knowledge of the agent's misrepresentations, because that case did not discuss the agent's apparent authority to perpetrate the alleged fraud. Likewise *Erisman* is distinguishable. The Colorado Court of Appeals has also recognized this exception for an agent's false representations made with apparent authority. *See Dyer*, 757 P.2d at 180.

After hearing each party's arguments, the district judge concluded the instruction based on § 261 was the correct law. This instruction based on § 261 is consistent with the legal principle recognized by the courts of Colorado that, when one of two innocent persons must suffer from the acts of a third, he must suffer who put it in the power of the wrongdoer to inflict the injury. *Bemel Assocs., Inc. v. Brown*, 164 Colo. 414, 435 P.2d 407, 411 (1968) (Sutton, J., dissenting), citing *Burck v. Hubbard*, 104 Colo. 83, 88 P.2d 955, 957-58 (1939); *see also Gordon v. Pettingill*, 105 Colo. 214, 96 P.2d 416, 418 (1939). This court has applied § 261 to principal-agent liability cases arising in Colorado. *See Thomas v. Colorado Trust Deed Funds, Inc.*, 366 F.2d 140, 143 (10th Cir. 1966); *L.J. Dreiling Motor Co. v. Peugeot Motors*, 605 F.Supp. 597, 610-11 (D. Colo. 1985), *aff'd*, 850 F.2d 1373 (10th Cir. 1988). We agree with the district judge's instruction based on § 261. We believe the Colorado Supreme Court would apply § 261 if placed in the position of the district court in this case.

Attorneys' Title next contends if § 261 is an accurate statement of the law of Colorado, the district court improperly substituted "theft" for "fraud" as one of the elements of proof. Attorneys' Title asserts § 261 was not intended to make a principal liable for every theft committed by a non-employee agent. Attorneys' Title argues that liability attaches to the principal only by the agent's misrepresentation or fraud and not simply by the agent's theft.

We have not been referred to, nor do we find, any cases where "theft" has been substituted for "fraud" in an instruction based on § 261. However, there are several cases in which § 261 has been applied to thefts. *See, Stone*

& Webster Eng'g Corp. v. Hamilton Nat'l Bank, 199 F.2d 127, 132 (6th Cir. 1952) (business liable for employee's theft from bank, where business placed employee in position to commit theft); *First Nat'l Bank v. United States*, 653 F.Supp. 1312, 1320 (N.D. Ill. 1987) (bank is liable to third party because its choice of agent exposed third party to loss); *Lucas v. Liggett & Myers Tobacco Co.*, 50 Haw. 477, 442 P.2d 460, 463 (1968) (§ 261 applied to theft of cigarettes); *Draemel v. Rufenacht, Bromagen & Hertz, Inc.*, 223 Neb. 645, 392 N.W.2d 759 (1986) (§ 261 applied to conversion by agent of commodities firm); *but see Lou-Con, Inc. v. Gulf Bldg. Servs., Inc.*, 287 So.2d 192 (La. App. 1973) (while § 261 may impose liability on a principal for an agent's theft, it will not impose liability for arson which is not reasonably foreseeable by the principal); *O'Malley v. Putnam Safe Deposit Vaults Inc.*, 17 Mass. App. Ct. 332, 458 N.E.2d 752 (1983) (claim based on § 261 against principal for agent's conversion of gold coins dismissed for failure to prove agent acted within apparent authority). Section 261 has also been applied as a basis to impose liability on a principal for an agent's offensive bodily contact. *Bowman v. Home Life Ins. Co.*, 243 F.2d 331, 334 (3d Cir. 1957).

Attorneys' Title cites in support of its proposition that an employer will not be liable for the thefts of its employees, *Roth v. First Nat'l State Bank*, 169 N.J. Super. 280, 404 A.2d 1182 (1979). In *Roth*, a customer brought suit against a bank to recover money he lost in a robbery because a bank teller disclosed the customer's banking practices to a third party. *Roth* is not persuasive because the basis for the principal's liability was not § 261, but rather vicarious liability based upon *respondeat superior*.

The court found no liability because the employee's tortious acts were outside the scope of her employment. In this case the jury was instructed and found Centennial "was apparently acting within its authority as an agent of Attorney's Title" at the time of the theft.

The trial judge is given substantial latitude in tailoring the instructions so long as they fairly and adequately cover the issues presented. *United States v. Pack*, 773 F.2d 261, 267 (10th Cir. 1985); *United States v. James*, 576 F.2d 223, 226 (9th Cir. 1978). A party has no vested interest in any particular form of instructions. The language of the instructions is for the court to determine. *United States v. Garcia-Rodriguez*, 558 F.2d 956, 965 (9th Cir. 1977), *cert. denied*, 434 U.S. 1050 (1978); *see also Tucker v. United States*, 151 U.S. 164, 170 (1894). Challenges which merely pertain to the trial judge's language or formulation of the charge are reversible only for an abuse of discretion. *James*, 576 F.2d at 227, citing *United States v. Park*, 421 U.S. 658, 673-76 (1975). The principal's liability under § 261 is not based on the nature of the agent's act, i.e., whether it is a misrepresentation or a theft, but rather is based upon the principal placing the agent in the position to interact with the third party who is harmed. The agent is acting in the place of the principal. The district court's substitution of "theft" for "fraud" in the instruction based on § 261 was not an abuse of discretion.

Attorneys' Title next asserts the trial court erred in failing to direct the verdict because Richards failed to prove Attorneys' Title placed Centennial in a position to harm Richards. Attorneys' Title contends Centennial was given possession of the down payment by the agreement

of Richards and the property purchaser, Snyder, and not by any action of Attorneys' Title.

The applicable standard of review in passing on the propriety of a motion for directed verdict is the same as that used by the trial court. *Swearngin v. Sears Roebuck & Co.*, 376 F.2d 637, 639 (10th Cir. 1967). We must conduct a *de novo* review of the evidence and the reasonable inferences therefrom in the light most favorable to the party opposing the motion. A scintilla of evidence is not sufficient to justify submitting a case to the jury, *id.*, but a verdict may not be directed unless the evidence points all one way and is susceptible of no reasonable inferences that would sustain the position of the party against whom the motion is made. *Ewers v. Board of County Comm'rs*, 802 F.2d 1242, 1247 (10th Cir. 1986), *cert. denied*, 108 S.Ct. 704 (1988).

Attorneys' Title's argument fails to consider the following evidence presented by Richards. Richards contacted Attorneys' Title and requested they issue title policies on the three Colorado properties, perform the closing on this transaction, and hold the proceeds until all documents were recorded. Attorneys' Title agreed. On the day of the closing an employee of Attorneys' Title told Richards that Walter, an employee of Centennial, would perform the closing. Closing services generally include holding the proceeds of the sale until all the documents are recorded. There is sufficient evidence in the record to support a conclusion by the jury that Centennial was acting as Attorneys' Title's agent in performing the closing and that Centennial's authority included holding the proceeds. The authority to hold the proceeds included authority to accept a check made payable to

Centennial for placement in its escrow account, and later to disburse the fee to the real estate agent and the net proceeds to the property seller. We conclude the district court did not err in denying Attorneys' Title's motion for directed verdict.

II.

The next issue Attorneys' Title raises is the district court's refusal of its tendered instruction on the issue of reliance. Attorneys' Title offered tendered instruction No. 15[1] which outlines the elements of liability of Attorneys'

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[1] Attorneys' Title tendered instruction No. 15 states:

In order for the Plaintiff, David K. Richards, to recover from the Defendant, Attorneys' Title Guaranty Fund, Inc., on his claim that Attorneys' Title Guaranty Fund is responsible for the theft of the escrow proceeds by Duane Marshall, you must find all of the following have been proved by a preponderance of the evidence:

1. Centennial Escrow was the agent for Attorneys' Title.

2. At the time of the theft, Duane Marshall was an employee of Centennial Escrow Services, Inc.

3. In stealing the funds, Mr. Marshall was acting in the course and scope of his employment for Centennial Escrow Services, Inc.

4. Attorneys' Title Guaranty Fund placed Centennial Escrow in a position which enabled Duane Marshall to steal the funds.

5. At the time of the theft Centennial Escrow was apparently acting within its authority as agent of Attorneys' Title.

(Continued on following page)

Title under § 261. It is substantially the same as the instruction given by the district court. *Supra*, op. at 5. Tendered instruction No. 15 contains the added element that: "Dave Richards relied upon the fact Centennial Escrow was acting within its apparent authority for Attorneys' Title." Attorneys' Title asserts the failure of the district court to give tendered instruction No. 15 removed the issue of reliance from the jury's consideration.

The admission or exclusion of a jury instruction is within the discretion of the trial court. *United States v. Zang*, 703 F.2d 1186, 1196 (10th Cir. 1982), *cert. denied*, 464 U.S. 828 (1983). The sufficiency of the instructions is not determined by giving or not giving particular instructions, but rather by viewing the instructions as a whole. *United States v. Beitscher*, 467 F.2d 269, 273 (10th Cir. 1972). Generally, the court satisfies its duty by giving instructions that sufficiently cover the case and that are correct. *United States v. Gurule*, 437 F.2d 239, 242 (10th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971); *United States v. Burns*, 624 F.2d 95, 105 (10th Cir.), *cert. denied*, 449 U.S. 954 (1980).

(Continued from previous page)

6. Dave Richards relied upon the fact Centennial Escrow was acting within its apparent authority for Attorneys' Title.

If you find that any one of these propositions has not been proved by a preponderance of the evidence, then your verdict must be for the Defendant, Attorneys' Title Guaranty Fund, Inc.

On the other hand, if you find that all of these propositions have been proved by a preponderance of the evidence, then your verdict must be for the Plaintiff, unless you should also find that Duane Marshall was also the agent for David Richards in holding the escrow funds, in which event your verdict must be for the Defendant.

Attorneys' Title asserts apparent authority requires (1) the principal make statements or act in a manner to make a third party believe the agent is authorized to act and, (2) the third party relies on the apparent authority to its detriment. The district court's instruction on apparent authority is taken from the standard Colorado Jury Instructions 2d Civil 7:14 (1980).[2] In order to establish apparent authority, the principal's words or conduct must cause another reasonably to believe that the agent is authorized to act. *See Kuehn v. Kuehn*, 642 P.2d 524 (Colo. App. 1981); *Russell v. First American Mtg. Co.*, 39 Colo. App. 360, 565 P.2d 972, 975 (1977); *Zambruk v. Perlmutter 3rd Generation Builders, Inc.*, 32 Colo. App. 276, 510 P.2d 472, 475 (1973); *but cf. Bemel*, 435 P.2d at 409-10 (to establish agency by estoppel reliance must be proven). Reliance is defined as a belief which motivates an act. *See* Colorado Jury Instructions 2d Civil 19:7 (1980).[3] The reasonable belief element of reliance is contained in the district court's instruction on apparent authority. The jury's determination that Centennial had apparent

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[2] Instruction 7:14 on apparent authority states:

When a principal by his words or conduct has caused another reasonably to believe that the principal has authorized his agent to take certain action on the principal's behalf, though in fact the principal may not have done so, such words or conduct constitute apparent authority, and as to the other person is the same as if the principal had authorized such action.

[3] Instruction 19:7 defines reliance as:

The plaintiff relied on the claimed representation if, believing it to be true, he took action he otherwise would not have taken, or decided against taking action he otherwise would have taken.

authority to act as Attorneys' Title's agent is also a finding that Richards reasonably believed Centennial was authorized to act. After viewing the instructions as a whole, we find the district court's refusal to include the reliance element in the general liability instruction based on § 261 is not error because the court's instruction on apparent authority properly placed the issue before the jury.

Attorneys' Title also asserts Richards did not rely on Centennial's authority to receive the sale proceeds in escrow because the closing instructions prepared by Richards did not discuss escrow of the proceeds. We find no merit to this argument because it fails to recognize the general rule that an agent's instructions come from the principal and not from the third party dealing with the agent. *Bank of British N. Am. v. Cooper*, 137 U.S. 473, 478 (1890).

III.

Attorneys' Title next asserts the district court improperly instructed the jury on the elements of an agency relationship because the instruction did not include the element that an agent is "subject to the control of the principal."

Attorneys' Title concedes the instruction the court gave is the standard Colorado jury instruction defining agency.[4] "Control" is not an element in this instruction.

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[4] Colorado Jury Instructions 2d Civil 7:3 AGENCY reads:

An agency is created by an agreement, written or oral, express or implied, by which the persons agree that one of them is to act for, or in the place of, the other. The person who agrees to act for another is called the agent, and other is called the principal.

This instruction is based on the Colorado Supreme Court's holding in *Pouppirt v. Greenwood*, 48 Colo. 405, 110 P. 195, 196 (1910). This instruction has been cited with approval by the Colorado Court of Appeals in *Cheney v. Hailey*, 686 P.2d 808 (Colo. App. 1984). *See also Shriver v. Carter*, 651 P.2d 436 (Colo. App. 1982). Attorneys' Title has failed to cite any cases in support of its theory that in Colorado a court's instruction defining agency must discuss the element of "control." We hold the district court did not err in refusing to instruct the jury that an agency relationship is based upon control. The instruction given sufficiently defines "agency" and is correct.

IV.

We conclude the district court properly instructed the jury based on § 261. The court did not err in refusing Attorneys' Title's instructions on "reliance" and "control." The district court's judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID K. RICHARDS, Plaintiff-Appellee, v. H. RAY CHRISTMAN and PLATTE VALLEY BANK, Defendants, and ATTORNEYS TITLE GUARANTY FUND, INC., Defendant-Appellant.	) No. 85-2656

ORDER
(Filed March 22, 1989)

Before SEYMOUR, MCWILLIAMS, AND BRORBY, Circuit Judges.

This matter comes on for consideration of appellant's motion for leave to file its petition for rehearing out of time and the appellant's petition for rehearing.

Upon consideration whereof, the motion to file the petition for rehearing out of time is granted through March 3, 1989.

It is further ordered that the petition for rehearing is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk